



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Virtual Public Engagement in Agency Rulemaking

Committee on Rulemaking

Proposed Recommendation for Plenary | June 15, 2023

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 The law often requires agencies to give interested persons an opportunity to participate in
2 rulemakings.¹ Presidential directives, including Executive Order 14,094, *Modernizing*
3 *Regulatory Review*, also instruct agencies to proactively engage a range of interested or affected
4 persons, including underserved communities and program beneficiaries.² And as a matter of best
5 practice, the Administrative Conference has encouraged agencies to consider additional
6 opportunities for public engagement.³

7 Interested persons are often able to learn about participation opportunities through notice
8 in the *Federal Register* and participate in the rulemaking by submitting written data, views, and
9 arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

¹ See, e.g., 5 U.S.C. § 553(c).

² 88 Fed. Reg. 21,879 (Apr. 6, 2023).

³ Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).

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10 Agencies may also provide opportunities for oral presentation, whether before or after an
11 NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or
12 listening session—what this Recommendation refers to as a “public rulemaking engagement.”
13 Agencies may provide a public rulemaking engagement because a statute, presidential directive,
14 or agency rule or policy requires one or because such engagement would improve agency
15 decision making and promote public participation in regulatory policymaking.⁴ The Conference
16 has encouraged agencies to hold public rulemaking engagements when it would be beneficial to
17 do so and to explore more effective options for notice, to ensure interested persons are aware of
18 and understand regulatory developments that affect them. Agencies also directly engage with
19 people and organizations that are interested in and affected by their rules, and the Conference has
20 encouraged them to do so consistent with rules governing the integrity of the rulemaking
21 process.⁵

22 When agencies engage with the public, they must ensure that they meet all legal
23 accessibility requirements.⁶ Effective public engagement also requires that agencies identify and
24 address overcoming barriers to participation, including geographical constraints, resource
25 limitations, and language barriers. For example, to ensure that all people affected by a
26 rulemaking are aware of the rulemaking and opportunities to participate, the Conference has
27 recommended that agencies conduct outreach that targets members of the public with relevant
28 views who do not typically participate in rulemaking or may otherwise not be represented.⁷

29 In recent years, and especially during the COVID-19 pandemic, agencies increasingly
30 have used widely available, internet-based videoconferencing software to engage with the

⁴ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin. Conf. of the U.S.).

⁵ See Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).

⁶ See, e.g., Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

⁷ E.g., Admin. Rec. 2021-3, *Early Public Input on Regulatory Alternatives*, ¶ 3, 86 Fed. Reg. 36,082, 36,082–36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 1(b), 84 Fed. Reg. 2146, 2147 (Feb. 6, 2019).



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31 public.⁸ By reducing some barriers that people—especially members of historically underserved
32 communities—encounter, virtual public engagement can help broaden participation in agency
33 rulemakings.⁹ At the same time, virtual engagements may present barriers to access for some
34 people, such as low-income individuals for whom it may be difficult to obtain access to high-
35 quality personal devices or private internet services, individuals in rural areas who lack access to
36 broadband internet, individuals whose disabilities prevent effective engagement in virtual
37 proceedings or make it difficult to set up and manage the necessary technology, and individuals
38 with limited English proficiency. Some individuals may also have difficulty, feel uncomfortable,
39 or lack experience using a personal device or internet-based videoconferencing software to
40 participate in an administrative proceeding.¹⁰

Commented [CA1]: Proposed Amendment from Council #1

41 This Recommendation encourages agencies to offer virtual options when they determine
42 it would be beneficial to hold a public rulemaking engagement or directly engage with specific
43 people and organizations. It also offers best practices for planning, improving notice of, and
44 managing public rulemaking engagements, as well as ensuring that members of the public can
45 easily access materials related to virtual public rulemaking engagements (e.g., agendas,
46 recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials).
47 This Recommendation builds on many previous recommendations of the Conference regarding
48 public participation in agency rulemaking, including Recommendation 2018-7, *Public*
49 *Engagement in Rulemaking*, which, among other things, encourages agencies to develop
50 comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, “*Ex*
51 *Parte*” *Communications in Informal Rulemaking*, which offers best practices for engaging with
52 members of the public while safeguarding the integrity of agency rulemaking.

⁸ This mirrors developments with respect to the use of virtual hearings in agency adjudication. See Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021).

⁹ Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking* (May 25, 2023) (report to the Admin. Conf. of the U.S.).

¹⁰ *Cf. Recommendation 2021-4, supra note 8.*



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RECOMMENDATION

Virtual Public Engagement Planning

- 53 1. ~~Each agency~~ that engages in rulemaking ~~generally~~ should utilize internet-based
54 videoconferencing software as a way to broaden engagement with interested persons in a
55 cost-effective way, including through outreach that targets members of the public with
56 relevant views who do not typically participate in rulemaking or may otherwise not be
57 represented. As part of its overall policy for public engagement in rulemaking (described
58 in Recommendation 2018-7, *Public Engagement in Rulemaking*), each agency should
59 explain how it intends to use internet-based videoconferencing to engage with the public.
- 60 2. Each agency should ensure that its policies regarding informal communications between
61 agency personnel and individual members of the public related to a rulemaking
62 (described in Recommendation 2014-4, *“Ex Parte” Communications in Informal*
63 *Rulemaking*) cover communications that take place virtually.
- 64 3. Each agency should prepare and post to a publicly available website guidance on the
65 conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening
66 session, or other live event that is rulemaking related and open to the general public—and
67 ensure employees involved with such engagements are familiar with that guidance.
- 68 4. When an agency plans to hold a public rulemaking engagement, it should allow for
69 interested persons to observe the engagement remotely and, when feasible, provide input
70 and ask questions remotely.
- 71 5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel
72 should collaborate with personnel who oversee communications, public affairs, public
73 engagement, and other relevant activities for the agency to ensure the engagement
74 reaches the targeted audience and facilitates effective participation from interested
75 persons, including groups that are affected by the rulemaking and have otherwise been
76 underrepresented in the agency’s administrative process.

Commented [CA2]: Proposed Amendment from Council #2

This proposed amendment would recognize that the costs of using videoconferencing as a way to broaden public engagement may outweigh the benefits of doing so in some circumstances.



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Notice

- 77 6. An agency should include, as applicable, the following information in the public notices
78 for a public rulemaking engagement with a virtual or remote component:
79 a. The date and time of the engagement, at the beginning of the notice;
80 b. Options for remote attendance, including a direct link or instructions to obtain a
81 direct link to the internet-based videoconference event and alternative remote
82 attendance options for members of the public without access to broadband
83 internet, at the beginning of the notice;
84 c. A plain-language summary of the rulemaking and description of the engagement's
85 purpose and agenda and the nature of the public input, if any, the agency is
86 seeking to obtain through the engagement;
87 d. A link to the webpage described in Paragraph 7;
88 e. Information about opportunities for members of the public to speak during the
89 engagement, including any directions for requesting to speak and any moderation
90 policies, such as limits on the time for speaking;
91 f. The availability of **services such as** closed captioning, language interpretation, and
92 telecommunications relay services and access instructions;
93 g. The availability and location of a recording, a transcript, a summary, or minutes;
94 and
95 h. Contact information for a person who can answer questions about the engagement
96 or arrange accommodations.
- 97 7. To encourage participation in a public rulemaking engagement, the agency **generally**
98 should create a dedicated webpage for each such engagement that includes the
99 information described in Paragraph 6. The webpage should include, as applicable:
100 a. A link to the internet-based videoconferencing event, its registration page, or
101 information for alternative remote attendance options for members of the
102 public without access to broadband internet;
103 b. A link to the *Federal Register* notice;

Commented [CA3]: Proposed Amendment from Council #3:

This proposed amendment would clarify that the list of services provided in the Recommendation is not exclusive.

Commented [CA4]: Proposed Amendment from Council #4:

This proposed amendment would recognize that the costs of creating a dedicated webpage for a public rulemaking engagement may outweigh the benefits of doing so in some circumstances.



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- 104 c. Any materials associated with the engagement, such as an agenda, a program,
105 speakers' biographies, a draft rule, the rulemaking docket, or questions for
106 participants;
107 d. A livestream of the engagement for the public to observe while it is occurring;
108 and
109 e. Any recording, transcript, summary, or minutes after the engagement has
110 ended.
- 111 8. The Office of the Federal Register (OFR) should update the *Document Drafting*
112 *Handbook* to provide agencies guidance on drafting *Federal Register* notices for public
113 rulemaking engagements with virtual or remote components that include the information
114 described in Paragraph 6.
- 115 9. OFR and the eRulemaking Program should update the "Document Details" sidebar on
116 FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is
117 a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

Managing Virtual Public Engagements

- 118 10. When feasible, each agency should allow interested persons to observe a livestream of
119 the public rulemaking engagement remotely at any time while it is occurring and should
120 not require members of the public to register. Agencies may want to set a registration
121 deadline for those wishing to speak or requiring accommodations.
- 122 11. To manage participants' expectations, an agency should communicate the following
123 matters, among others, to participants at the beginning of the event:
- 124 a. The purpose and goal of the engagement;
- 125 b. The moderation policies, including those governing speaking time limits and
126 whether or why the agency ~~can will~~ or ~~cannot will not~~ respond to oral
127 statements made by participants;
- 128 c. The management of the public speaking queue;



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- 129 d. Whether the chat function, if using an internet-based videoconferencing
130 platform, will be disabled or monitored and, if monitored, whether the chat
131 will be included in the record;
132 e. How participants can access the rulemaking materials throughout the meeting;
133 and
134 f. Whether the event will be recorded or transcribed and where it will be made
135 available.
- 136 12. As agency resources allow, Each agency should ensure it has adequate support to run
137 public rulemaking engagements, including their virtual and other remote components.
138 Adequate support might include technological or troubleshooting assistance, a third-party
139 moderating service, or a sufficient number of staff members available.

Recordings and Transcripts

- 140 13. When an agency holds a public rulemaking engagement, it should record, transcribe,
141 summarize, or prepare meeting minutes of the engagement unless doing so would
142 adversely affect the willingness of public participants to provide input or ask questions.
- 143 14. Each agency should in a timely manner, make any recording, transcript, summary, or
144 minutes of a public rulemaking engagement available in any public docket associated
145 with the rulemaking and on the webpage described in Paragraph 7, and should do so in a
146 timely manner.

Commented [CA5]: Proposed Amendment from Council #5:

This proposed amendment would acknowledge that agencies will need to consider their available resources in providing support for public rulemaking engagements.